

No. 85-1530

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM E. BROCK, SECRETARY,

AND

ALAN C. McMILLAN, REGIONAL ADMINISTRATOR,
OCCUPATIONAL SAFETY & HEALTH
ADMINISTRATION,

Appellants,

vs.

ROADWAY EXPRESS, INC.,

Appellee.

MOTION TO AFFIRM

MICHAEL C. TOWERS

(Counsel of Record)

JOHN B. GAMBLE, JR.

FISHER & PHILLIPS

3500 First Atlanta Tower

2 Peachtree Street

Atlanta, Georgia 30383

(404) 658-9200

Attorneys for Appellee

309

TABLE OF CONTENTS

STATEMENT	1
ARGUMENT	7
CONCLUSION	16
APPENDIX	A1

TABLE OF AUTHORITIES

Cases

<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974)	8, 13
<i>Barry v. Barchi</i> , 443 U.S. 55 (1979)	10, 12
<i>Cleveland Board of Education v. Loudermill</i> , U.S., 105 S.Ct. 1487, 84 L.Ed.2d 494 (No. 83-1362, March 19, 1985)	10, 12, 13
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	9, 13, 14, 16
<i>Greene v. McElroy</i> , 360 U.S. 474 (1959)	9
<i>Mackey v. Montrym</i> , 443 U.S. 1 (1979)	10, 11
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	7, 10, 11, 15
<i>Roadway Express, Inc. v. Brock</i> , 624 F.Supp. 197 (N.D. Ga. 1985)	1
<i>Roadway Express, Inc. v. Donovan</i> , 603 F.Supp. 249 (N.D. Ga. 1985)	6
<i>Southern Ohio Coal Co. v. Donovan</i> , 774 F.2d 693 (6th Cir. 1985)	8, 14

Constitution, Statutes and Regulation

U.S. Const. Amend. V (Due Process Clause)	8, 14
Surface Transportation Assistance Act of 1982 (STAA)	
49 U.S.C. §2305	2, 14
49 U.S.C. §2305(c) (1)	3
49 U.S.C. §2305(c) (2) (A)	passim
29 C.F.R. §1977.18	3

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on November 18, 1985, by the Honorable G. Ernest Tidwell, Judge, United States District Court of the Northern District of Georgia. He declared that the Order of the Secretary of Labor dated January 21, 1985 is violative of the requirements of procedural due process to the extent that it requires the appellee to temporarily reinstate a discharged employee prior to an evidentiary hearing. He further held that 49 U.S.C. §2305 (c) (2) (A) is unconstitutional and void to the extent that it empowers appellants to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process. Accordingly, the District Court permanently restrained and enjoined the appellants and any of their officers, agents and anyone acting in concert therewith from further issuance of preliminary orders of reinstatement pursuant to 49 U.S.C. §2305(c) (2) (A) without first conducting an evidentiary hearing which complies with the minimum requirements of procedural due process under the Fifth Amendment to the United States Constitution.¹

1. The decision of Judge Tidwell is reported. *Roadway Express, Inc. v. Brock*, 624 F.Supp. 197 (N.D. Ga. 1985). The decision is also reproduced in the appellants' index at p. 1a et seq. Appellee will reference the appellants' appendix as "DOL App." with appropriate page number. References to appellee's appendix will be "App." with appropriate page number.

The action by appellee Roadway Express, Inc. ("Roadway") arose out of appellants' issuance of an order on January 21, 1985, requiring Roadway to reinstate a previously discharged employee. The order was entered after an investigation had been conducted by the United States Department of Labor ("DOL") pursuant to 49 U.S.C. §2305(c)(2)(A) to determine whether there was "reasonable cause to believe" that there was "merit" to the discharged employee's complaint that Roadway had discharged him in violation of Section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §2305 ("STAA"). At the time the order was entered, the DOL had conducted an investigation and had concluded that there was reasonable cause to believe that the discharged employee's complaint had merit. The DOL had not conducted an evidentiary hearing to resolve the factual issues raised during the investigation of the case, had not permitted Roadway to review statements it had obtained from witnesses during its investigation, and had not provided Roadway with a list of the names of persons who had given such statements. The basis for the Department of Labor's denial of access to information developed during the investigation was that the identity of witnesses and their statements were confidential. DOL App. 49a.

On November 22, 1983, Jerry W. Hufstetler, a road driver based at Roadway's Lake Park, Georgia terminal was discharged for committing an act of dishonesty by intentionally creating a breakdown of his vehicle. Hufstetler filed a grievance under the collective bargaining agreement which governed his employment, alleging that he had been discharged without just cause and in retaliation for making a safety-related complaint. On January 30, 1984, the Southern Area Grievance Committee, a final and binding arbitration panel, rejected Hufstetler's claim that he had been dismissed in retaliation for re-

porting safety violations and determined that he had been properly discharged for committing an act of dishonesty. DOL App. 48a.

On February 7, 1984, Hufstetler contacted the DOL and claimed that he had been dismissed for reporting safety concerns in violation of Section 405 of the STAA. DOL App. 48a. The Department of Labor conducted a field investigation over a period of approximately 11 months. It interviewed witnesses, took statements and compiled "independent evidence." DOL App. 45a, 49a.

When Hufstetler made his complaint, the DOL pursuant to the statutory requirement (49 U.S.C. §2305(c)(1)) notified Roadway that he had complained to them that his discharge for an act of dishonesty was a pretext to terminate him in retaliation for making a safety-related complaint. Roadway, with no more than the charge to which to respond, submitted a position statement with evidence it felt would negate the ex-employee's allegations and show that the complainant had, in fact, been discharged for an act of dishonesty. Roadway did not have the benefit of the evidence gathered by the DOL in investigating the charge when it was shaping its response.²

2. The appellee submitted a written position statement without the benefit of the evidence gathered by the Department of Labor investigators. Counsel to the appellee met with the Department of Labor investigator and Department of Labor attorneys as a follow up to correspondence complaining about what Roadway considered were unconstitutional procedures. DOL App. 49a, Complaint ¶13, Answer ¶13. The meeting also focused on Department of Labor regulations in which "the Secretary . . . recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements" and authorizes deferral to arbitration awards. See 29 C.F.R. §1977.18. The meeting with the Department of Labor definitely did not include a disclosure of the Department of Labor's evidence and an opportunity for Roadway's counsel to respond. Suggestions to the contrary at page 19 of the Jurisdictional Statement are neither accurate nor based on any record evidence.

Under the DOL's principle of confidentiality of informers, Roadway was denied access to written statements of witnesses interviewed by the Department of Labor during its investigation and was also refused the names of individuals from whom statements were taken by the investigator.³

Following the eleven month investigation, the Regional Administrator of Region IV of the Occupational Safety and Health Administration, on behalf of the Secretary of Labor, made factual determinations based on witness credibility and veracity. He made these determinations without affording Roadway the opportunity to test or challenge the testimony and evidence in some form of an evidentiary hearing. Based on secret evidence gathered during the investigation from unknown parties, the Regional Administrator of the Occupational Safety & Health Administration made the following factual determinations and factual conclusions:

4. On or about November 22, 1983, Respondent notified Jerry W. Hufstetler that he was discharged from employment as of November 22, 1983, principally because he allegedly had created a false breakdown, an act of dishonesty, on November 22, 1983. *Respondent's evidence to support the discharge is conjecture. Complainant has presented evidence to support his innocence. Respondent had threatened to do anything they could to catch the Complainant doing something wrong, to get rid of him.*

6. *Respondent had warned Complainant and threatened to get him due to his excessive breakdowns due to Complainant's recognition of safety violations.*

3. The statements of witnesses were not made available until after they had testified at the postdeprivation hearing. If there were any exculpatory evidence or statements gathered during the investigation, it was never disclosed to appellees by the DOL.

7. Respondent's termination of Complainant's employment was discriminatorily motivated by Complainant's protected activity.

DOL App. 21a-22a. [Emphasis supplied.]

Having made these factual determinations and reached these factual conclusions, the Regional Administrator on behalf of the Secretary of Labor on January 21, 1985, pursuant to the statutory mandate at 49 U.S.C. §2305(c)(2)(A), issued a Preliminary Order requiring, *inter alia*, that Hufstetler be "immediately" reinstated to his former position at Roadway. By statute this order is not stayed pending a hearing on the merits. *Id.*⁴

4. Timely exceptions to the Regional Administrator's substantive findings were taken by Roadway and pursuant to 49 U.S.C. §2305(c)(2)(A) the matter was set for hearing. A post-deprivation hearing was held before Administrative Law Judge James W. Kerr, Jr. ("ALJ") on March 26 through March 29, 1985. The substance of the ALJ's decision and recommended order on the postdeprivation hearing is irrelevant to the due process considerations here. The Secretary's attachment of his Recommended Decision and Order to the Jurisdictional Statement is inappropriate and objectionable. (DOL App. F, p. 29a *et seq.*) The appellee filed sixty-five pages of exceptions and brief to the ALJ's Recommended Decision and Order but is not burdening this record by making it a part of its appendix. However, appellee is attaching its supplemental letter exceptions to the Secretary of Labor occasioned by the Secretary of Labor's disclosure that the ALJ rendered his recommendation without the benefit of any of the hearing exhibits which either the ALJ's office or the court reporter had lost. Those exhibits included the deposition *de bene esse* of the individual who charged Hufstetler with dishonesty and who the DOL charged was retaliating against him. They also included the deposition *de bene esse* of Roadway's labor relations manager who made the final decision to let the discharge stand and proceed to arbitration. Those depositions were not read into the record but were introduced as exhibits to be read by the ALJ. Since they were lost and not read, the ALJ did not consider Roadway's testimony evidence at all. As the substantive case of retaliation turns on the motive and intent of these two individuals (to say nothing of their facts which bring into question the veracity of the testi-

(Continued on following page)

On February 1, 1985, Roadway filed a complaint in the United States District Court for the Northern District of Georgia seeking injunctive and declaratory relief. On February 11, 1985, the court entered an order granting Roadway's motion for preliminary injunction.⁵ Thereafter, appellee filed a motion for summary judgment seeking a final order of a permanent injunction and a declaration that 49 U.S.C. §2305(c)(2)(A) is unconstitutional. Based on the Undisputed Statement of Material Facts (DOL App. H, pp.46a-51a), Judge Tidwell entered a final order declaring that

the Secretary's preliminary order of January 21, 1985 is violative of the requirements of procedural due process to the extent that it requires [Roadway] to temporarily reinstate Hufstetler prior to an evidentiary hearing It is declared further that 29 [sic] U.S.C. §2305(c)(2)(A) is unconstitutional and void to the extent that it empowers [appellants] to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process. Accordingly, the [appellants] . . . are hereby restrained and enjoined from further issuance of preliminary orders of reinstatement pursuant to 49 U.S.C. §2305(c)(2)(A), without first conducting an evidentiary hearing which complies with the minimum requirements of proce-

Footnote continued—

mony offered by the appellant), this decision, rendered without the testimony of Roadway's witnesses, has no more value from a due process standpoint than the *ex parte* Secretary's findings and preliminary order rendered by the Regional Administrator. See App. A2-A6, General Objections.

5. *Roadway Express, Inc. v. Donovan*, 603 F.Supp. 249 (N.D. Ga. 1985). The order is reproduced in the appendix to the Jurisdictional Statement. DOL App. B, p.11a et seq.

dural due process under the Fifth Amendment to the United States Constitution.

DOL App. 9a.

ARGUMENT

The decision of the District Court is plainly correct, and thus the question presented by appellants is so unsubstantial as to need no further argument. Title 49 U.S.C. §2305(c)(2)(A) specifically calls for the reinstatement of discharged employees following an *ex parte* determination by the Department of Labor which is based upon the resolution of disputed facts and the making of credibility determinations. The factual determinations are made and the reinstatement order is entered before an evidentiary hearing is held.

Roadway agrees with the Secretary that the resolution of the issue of whether the administrative procedures resulting in deprivation of a property interest are constitutional turns on the consideration of the three factors set out in *Mathews v. Eldridge*:

first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335. Jurisdictional Statement p. 12.

The Secretary does not dispute that his order of reinstatement pending a hearing results in the deprivation

of Roadway's property interests which are protected by the Due Process Clause. Jurisdictional Statement p. 11.⁶ The Secretary does not dispute that an employer should be afforded the opportunity to be heard before being required to reinstate temporarily an employee, pending a formal evidentiary hearing. Jurisdictional Statement p. 12. The Secretary simply asserts that the statutorily required notice of the employee's charge, coupled with the opportunity to respond, satisfies the employer's constitutional right to be heard before it is ordered to reinstate the terminated employee.

Roadway, however, asserts that the preliminary reinstatement procedures mandated by 49 U.S.C. §2305(c)(2)(A) are so flawed in terms of the risk of erroneous deprivation that they are, alone, constitutionally fatal to the statutory scheme. The fundamental reason why the pre-hearing reinstatement procedure set out in the statute is unconstitutional is that the STAA calls for an *ex parte* decision-making process in circumstances which require a resolution of disputed facts (some of which are not even

6. The appellants attempt to minimize Roadway's property interest being affected. They characterize it as only a requirement that an employer pay a reinstated employee during the term of reinstatement. They say this cost is mitigated by the fact that an employer receives the benefits of the employee's labor. Jurisdictional Statement pp. 11, 14. The appellants ignore the undisputed facts that the private property interests were substantially more. The *ex parte* reinstatement order had the effect of upsetting an arbitration decision rendered under the collective bargaining agreement which had sustained the complainant's discharge for an act of dishonesty; it had the effect of displacing employees junior to the complainant on the seniority roster and bumping an employee to lay-off status. All of this was recognized and considered by the District Court as adversely affecting discipline and morale in the work place, fostering disharmony and ultimately impairing the efficiency of the business. DOL App. 7a, citing *Arnett v. Kennedy*, 416 U.S. 134, 168 (Powell, J. concurring) (1974), and *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985).

known to the employer), which turns on credibility determinations and veracity.⁷ As this Court said in *Goldberg v. Kelly*, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 397 U.S. 254, 269 (1970). The Court then reaffirmed the fundamental principles set out in *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959):

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

397 U.S. at 270.

7. If the ALJ's Recommended Decision and Order (DOL App. F) has any relevancy to this appeal it is that it shows the array and complexity of the facts, disputed testimony, other disputed evidence, and credibility determinations which the Regional Administrator took it upon himself to resolve without the benefit of the adversarial process. Cf. *supra* note 4.

The Secretary asserts that "[t]his Court's decisions make it clear that it is sufficient for the Secretary to afford an employer notice and an opportunity to respond to the allegation of an unlawful discharge before issuing a temporary reinstatement order, so long as a prompt postdeprivation hearing also is available." Jurisdictional Statement p. 12. In support of this proposition, the appellant directs the Court's attention to the cases of *Mackey v. Montrym*, 443 U.S. 1 (1979); *Cleveland Board of Education v. Loudermill*, U.S., 105 S.Ct. 1487, 84 L.Ed.2d 494 (No. 83-1362, March 19, 1985); *Barry v. Barchi*, 443 U.S. 55 (1979); and *Mathews v. Eldridge*, 424 U.S. 319 (1976) as the basic authority on which the Secretary relies. Each of those decisions bottoms on the facts of the individual case. They must be read in light of the fundamental "truism" concerning due process requirements which govern pre-hearing deprivation by administrative action. This "truism" was restated in *Mathews v. Eldridge*:

"'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 US 886, 895, 6 L Ed 2d 1230, 81 S Ct 1743 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 US 471, 481, 33 L Ed 2d 484, 92 S Ct 2593 (1972).

424 U.S. at 334.

The particular situations addressed in each of the appellants' authorities are inapposite to the fact situations which are found in this case and which exist in STAA Section 405 claims by the very nature of the questions

and issues raised. In the cases relied upon by appellants, the administrative decision which resulted in a pre-hearing deprivation of a property interest was based on objective evidence which did not turn on resolving disputed questions of fact, credibility, or veracity. Each of the cases relied upon by appellants recognizes this distinction. The Court, in *Mackey v. Montrym*, held that it was constitutionally proper to suspend a person's driver's license for refusal to submit to a breath/alcohol test before affording the license holder an evidentiary hearing. It was proper because the "predicates" for the suspension "are objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him." 443 U.S. at 13. Thus, the risk of erroneous deprivation was minimal.

In *Mathews v. Eldridge*, 424 U.S. 319, the Court held that an evidentiary hearing was not required before social security disability benefits could be administratively terminated. Central to the Court's ruling that there was not a substantial risk of erroneous deprivation were two considerations. First, the administrative decision to terminate benefits turned on routine, standard, and unbiased medical reports by physician specialists. A medical assessment of disability is "a more sharply focused and easily documented decision than . . . [a] determination . . . [on which] a wide variety of information may be deemed relevant, and [on which] issues of witness credibility and veracity often are critical to the decision making process." *Id.* at 343-44. Second, the procedure offered "[a] further safeguard against mistake": the person whose property interest was being terminated was allowed "full access to all information relied upon by the . . . agency." *Id.* at 345-46. Neither of these safeguards is present under 49 U.S.C. §2305(c) (2) (A).

In *Barry v. Barchi*, 443 U.S. 55, the suspension of a race horse trainer's license was sustained over contentions that it violated the Due Process Clause because the interim suspension took effect before a hearing to determine the trainer's culpability for drugging a horse.⁸ The statute provided for immediate suspension of a trainer's license if certain drugs were discovered in the horse's urine after a race. Under the statute, the trainer was held to the standard of an "insurer" that the horses for which he was responsible were not administered the proscribed drugs. Thus, this Court held that the fact of drugs in the urine, which could be objectively determined by an expert, was sufficiently reliable to satisfy the constitutional requirements for an interim suspension. This holding turned on the fact that the statutory "rebuttable presumption/insurer" standard was met by objective evidence which was not subject to the resolution of credibility or veracity challenges. Thus, the Court held that a predeprivation "adversary hearing to resolve questions of credibility and conflicts in the evidence" was not required to satisfy due process requirements. *Id.* at 65.

The facts of the most recent case, *Cleveland Board of Education v. Loudermill*, also fall into the category of cases where there is no dispute of facts which requires an adversary hearing to resolve questions of credibility and conflicts in the evidence. *Loudermill* stated on his employment application that he had no felony convictions. During a routine investigation of his employment records his employer discovered the objective fact that he had a grand larceny conviction. He was fired by his public

8. The suspension was, however, found to violate the Constitution because, as the statute was applied to Barchi, he was denied a prompt post-suspension hearing. See *infra* pp. 14-16.

sector employer without a prior evidentiary hearing or any opportunity to respond to the charge on which his discharge was based. His discharge was overturned on constitutional grounds. However, the Court then noted that his constitutional right to due process would have been satisfied under these facts if he had simply been given an "opportunity to invoke the discretion of the decision maker" to consider "plausible arguments" why discharge would be an inappropriate penalty in the face of the objective fact that the information on the employment application was not true. 84 L.Ed.2d at 504-05. The concurring opinion of Justice Brennan clarified that "[f]actual disputes are not involved" in *Loudermill*. *Id.* at 511 (Brennan, J., concurring).

That the case at bar is not governed by the appellants' line of authority is clear. There are factual disputes about every element of Hufstetler's claim. The substantive underlying dispute is an assertion that Hufstetler did not commit an act of dishonesty, that the claim of dishonesty was pretextual, and that the employer's motivation for firing him was in fact retaliation for making safety complaints.⁹

The decision of *Goldberg v. Kelly*, 397 U.S. 254, offers the controlling authority for this case. *Goldberg* recognizes the constitutional principle "[t]hat the fundamental

9. This is not a case of state action on the part of a public employer as in *Loudermill* or *Arnett v. Kennedy*. Hufstetler's rights to continued employment with Roadway were derived from his collective bargaining agreement and the STAA. If Roadway and the arbitration panel were wrong in their assessment of Hufstetler's acts, he has no statutory claim to reinstatement unless there is both a finding that the arbitration panel was wrong in its factual determinations and that Roadway's motive in firing Hufstetler was illegal retaliation. There is also, of course, the issue of mixed motive—but for Hufstetler's alleged safety complaint, would he have been fired for committing an act of dishonesty?

requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Id.* at 267 (citations omitted). The case recognizes that the procedures required by due process vary according to the specific circumstances of the deprivation action in question. From those predicates, the Court said:

[W]ritten submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.

Id. at 269. See also *Southern Ohio Coal Co. v. Donovan*, *supra*, 774 F.2d 693.

Roadway was precluded from testing the credibility and veracity of the witnesses relied on by the Regional Administrator, from testing the truth or completeness of the evidence presented to the DOL investigator by the complainant, and from shaping a defense with the benefit of the record on which the appellant was making his decision to order preliminary reinstatement. For each of these reasons Roadway was denied the due process secured for it by the Fifth Amendment to the Constitution. The statute is unconstitutional to the extent that it mandates any one of these procedures and an order based thereon.

The fundamental reason the procedure specified in 49 U.S.C. §2305 is not constitutional is that the STAA mandates an *ex parte* decision-making process which results in a deprivation of a property interest in circumstances which require, by the nature of the questions involved, a resolution of disputed facts which turn on credibility

and veracity. Thus, the risk of erroneous deprivation is, alone, so great as to be fatal to the statutory scheme. However, the appellants, relying on a belief that the pre-deprivation procedure is temporarily sufficient, also argue that the length of the deprivation is *de minimis*. Jurisdictional Statement pp. 12, 17-18. To short circuit any discussion of this issue, they assert that Roadway cannot complain about the length of the deprivation allowed by the statute because the preliminary order affecting Roadway was struck down by injunction. *Id.* at note 9. The appellants are wrong on both points. The test set out in *Mathews v. Eldridge* is a balancing test of three factors: the weight of the private interests, the risk of erroneous deprivation, and the government's interest. 424 U.S. at 335. The period of time that an employer would be required to have a reinstated individual on its payroll is a factor to be considered in measuring the weight of the private property interest which is being taken.¹⁰ Thus, for the constitutional consideration at bar, it is irrelevant that appellants' order was struck down by injunction as it affected Roadway.

Under the STAA, following the date of the entry of a preliminary order of reinstatement, a hearing must be expeditiously held. 49 U.S.C. §2305(c)(2)(A). In this case that was 64 days, January 21, 1985—March 26, 1985. Following the close of the hearing, the Secretary must enter an order within 120 days. *Id.* One interpretation of that requirement is that the Secretary's final order must be entered within 120 days following the close of taking evidence. See DOL App. 7a, Decision of Judge Tidwell. As a matter of practice, the close of the hearing

10. See *supra* note 6 for a discussion of the elements which comprise the private property interest of Roadway which is at issue in this case.

is being interpreted by the Secretary of Labor as occurring upon the entry of the ALJ's decision and recommended order. Thus, the 120-day period referenced in the statute is a meaningless yardstick to measure the length of deprivation under current practice. The actual period of deprivation is dictated by the amount of time it takes the ALJ to issue a recommendation. Here, the ALJ's recommendation was entered October 30, 1985, seven months following the hearing which concluded March 29, 1985. Therefore, over nine months passed between the entry of the pre-hearing order of reinstatement (January 21, 1985) and any post-hearing order. Such a lengthy period of time certainly adds significant weight to the private interest being abridged by appellants' order.

CONCLUSION

"The fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. at 267. Questions of fact, credibility and veracity must be resolved in employee reinstatement cases under Section 405 of the STAA. Therefore Judge Tidwell was correct in his judgment and declaration "that 49 U.S.C. §2305(c)(2) (A) is unconstitutional and void to the extent that it empowers [appellants] to order reinstatement of discharged employees prior to conducting an evidentiary hearing which comports with the minimum requirements of due process." DOL App. 9a. This statute is so clearly unconstitutional and Judge Tidwell's judgment and order so clearly correct that the question on appeal is unsubstantial and warrants no further argument.

We respectfully submit, therefore, that the appellants present no substantial question for further consideration by this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

FISHER & PHILLIPS

MICHAEL C. TOWERS

(Counsel of Record)

JOHN B. GAMBLE, JR.

Attorneys for Appellee

3500 First Atlanta Tower

Atlanta, Georgia 30383

(404) 658-9200

A1

APPENDIX

Law Offices
FISHER & PHILLIPS
(A Partnership Including Professional Corporations)
3500 First Atlanta Tower
Atlanta, Georgia 30383-0101
Telephone (404) 658-9200

February 10, 1986

William E. Brock, Secretary of Labor
U.S. Department of Labor
Francis Perkins Building
Room S-2018
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Hufstetler/Roadway Express
Case No. 85-STA-8
SOL Case No. 16213

Dear Secretary Brock:

This law firm represents Roadway Express Inc., ("Roadway"), respondent in the above case. This letter is in response to the Order Remanding Case to Secretary of Labor dated February 4, 1986 ("February 4, 1986 Order") which we recently received from James W. Kerr, Jr., Administrative Law Judge ("ALJ"), New Orleans, Louisiana. The ALJ attached two lists to the February 4, 1986 Order. Exhibit A is described in the Order as a list of exhibits which have been "reconstructed." Exhibit B is described as a list of exhibits which "the parties are unable to reconstruct". The February 4, 1986 Order states that any

parties wishing to file any addition, correction or objection to Exhibits A and B or to the reconstructed exhibits must do so before February 6, 1986. (Copies of the "reconstructed exhibits" submitted to the Secretary were not enclosed with the copy of the order mailed to respondent's counsel.)

The undersigned counsel for the respondent received Judge Kerr's February 4, 1986 order by express mail on Thursday, February 5, 1986. Due to other pressing commitments, Roadway's attorneys were unable to complete preparation of this letter until today, Monday, February 10, 1986. This letter is being forwarded to the Secretary of Labor and to the ALJ by express mail, with copies sent by regular mail to the individuals listed below. It is requested that this letter and the enclosures be retained as a part of the permanent record of this administrative proceeding.

General Objections to the Procedure Followed by the ALJ

Apart from its specific objections to the ALJ's recent submission to the Secretary, listed below, it should be noted at the outset that Roadway strongly objects to the procedure which the ALJ has followed in rendering his decision in this case.

On Monday, January 27, 1986 the undersigned counsel for the respondent telephoned the Office of the Administrative Law Judges in New Orleans, Louisiana regarding the ALJ's efforts to reconstruct the missing record of exhibits in this case. Respondent's counsel spoke with Ms. Jeanine Eckholdt, law clerk to Judge Kerr, and asked whether the Office of Administrative Law Judges had ever had the exhibits of record at any time after the March 26-29, 1985 hearing. Ms. Eckholdt replied that they

had never gotten the record from the court reporters, and that they were then in the process of trying to contact the court reporters to see what had happened to the record.

Thus, it appears that in preparing and issuing his Recommended Decision and Order in this case Judge Kerr either (1) knew and failed to mention in his recommended order that he did not have any of the missing exhibits (all of the exhibits submitted by the parties at the hearing on March 26-29, 1985 and most of the exhibits submitted after the hearing), or (2) prepared and issued his recommended order without realizing that the exhibits were missing. In either event, it is clear that the ALJ did not review the missing exhibits in preparing his recommended decision, and that he has never read many of the exhibits presented by the parties at the March 26-29, 1985 hearing.

Roadway intends to prepare and file additional formal exceptions to Judge Kerr's Recommended Order and Decision based upon his issuance of the order without the benefit of the record of exhibits. However, a special point should be made concerning the deposition testimony of Michael Titus, a central figure in the factual disputes presented in this case, and perhaps Roadway's most important witness. Michael Titus was the St. Petersburg, Florida Roadway terminal manager who accused the complainant Jerry Hufstetler of committing the act of dishonesty for which he was discharged, and he is the person Hufstetler accuses of having a vendetta against him for allegedly making safety complaints. Titus gave detailed testimony about all of the facts surrounding his accusations that Hufstetler committed an act of dishonesty, and testified from a now missing videotape about the physical view he had of Mr. Hufstetler and his vehicle on the night in question.

Although a small portion of the Titus deposition was read into the record at the hearing, the bulk of the deposition was simply submitted and received into evidence in transcript form with the parties' understanding and expectation that the ALJ would read and review it before issuing his recommended decision. The court reporter had possession of the exhibits, including the Titus deposition, throughout the hearing. Since Judge Kerr never received any of the exhibits at any time after the March 26-29, 1985 hearing, it is apparent that he has never read the Titus deposition. This fact is particularly significant inasmuch as Judge Kerr's recommended decision purports to be "based upon all evidence admitted at the hearing and the post-hearing submissions." (Recommended Decision, p. 1). However, it does explain the ALJ's failure throughout his opinion to discuss the sworn testimony of Michael Titus.

Likewise, the deposition testimony of Pete Webb, Roadway's Labor Relations Manager, was not read at the hearing (on the assumption that Judge Kerr would carefully review it in reaching his recommended decision), was kept in the custody of the court reporter after being admitted into evidence, and was nowhere referred to in the ALJ's opinion. Webb was the Roadway manager who made the company's final decision sustaining the discharge of the complainant and refusing to reinstate him after a thorough joint company/union investigation had been completed.

It is Roadway's position that it would be reversible error at this juncture for the Secretary of Labor to render a final decision and judgment based upon the ALJ's belated (and unsuccessful) attempt to reconstruct the record after his Recommended Decision and Order has issued. The

ALJ's willingness to prepare and render a recommended order in favor of the complainant without even mentioning the fact that the record of exhibits was missing shows a clear bias, and an intent to render a decision in favor of the complainant regardless of what might be shown by deposition testimony and other documentary evidence supporting Roadway's position. The ALJ's Recommended Decision and Order is therefore tainted by the ALJ's demonstrated lack of objectivity and refusal to review the evidence from a fair-minded perspective and, Roadway submits, cannot be relied upon as a basis for resolving the credibility issues raised in this proceeding.

Furthermore, it would appear to be impossible for the Secretary of Labor to adequately evaluate the evidence of record without benefit of the recommendations of an ALJ inasmuch as substantial portions of the physical evidence submitted by the parties at the hearing cannot be reproduced. These missing and irreplaceable exhibits include two marker light plugs (one submitted by each party) as to which there was testimony from an expert witness called by the Solicitor's office, a trailer marker light submitted into evidence by Roadway, a photograph of a view of the complainant's vehicle (taken by his union representative) as to which there was important testimony, and a videotape of a view of the complainant's vehicle and of a walk-around inspection as to which there was important testimony from respondent's witnesses, including Titus.

Without access to this physical evidence, the Secretary will simply be unable to fairly evaluate and appreciate the testimony of live witnesses as reflected in the transcript. Under the circumstances, it would appear that a retrial of this entire matter before a different ALJ is the

only feasible remedy to the problems now presented by the fact that these exhibits are missing and by the ALJ's decision to render an opinion without advising either the Secretary or the parties that the exhibits (including the deposition testimony of Titus and Labor Relations Manager (Webb)) were missing.

Specific Objections to the ALJ's February 4, 1986 Submission

In direct response to the ALJ's February 4, 1986 Order, Roadway has the following objections and comments:

1. In Exhibit A to the February 4, 1986 Order, Def. Ex. 44 is referred to as a "three page document" with "only p. 2 unreconstructed-pages 1 and 3 attached". Page 2 of Exhibit 44 was submitted into evidence, and it can be "reconstructed." Roadway's counsel was unaware that page 2 was missing prior to receipt of the February 4, 1986 Order. A copy of all three pages of Exhibit 44 is enclosed with this letter.

2. Exhibit A to the February 4, 1986 Order refers to Def. Ex. 56 as "identified Tr. p. 1117, not rec'd." This reference is in error and apparently results from confusion with Def. Ex. 57, which was properly referenced as "identified Tr. p. 1117, not rec'd." In fact, Def. Ex. 56 was received in evidence, as indicated on page 1077 of the transcript.

3. On Exhibit A to the ALJ's February 4, 1986 order, two exhibits, affidavits of Roadway managers Thomas R. Warren and Brian M. Curran, are referred to with the notation "signed copy unavailable". Signed and notarized originals of these affidavits were submitted into evidence by Roadway after the hearing with the permission of (and

at the suggestion of) the ALJ. However, the originals were executed and mailed to the ALJ by the affiants themselves, and copies of the signed, notarized affidavits were not retained. In response to the ALJ's Order, Roadway has submitted unsigned copies in lieu of the originals. Roadway has offered and remains willing to obtain re-executed affidavits from these individuals signed and notarized with a current date, if requested by the ALJ or by the Secretary. (With regard to other post-hearing exhibits submitted by Roadway, it is assumed that the Secretary already has complete and accurate copies of the exhibits listed on the attachment to the Secretary's January 7, 1986 Order of Remand.)

4. Exhibit B to the February 4, 1986 Order (listing exhibits which are missing and cannot be reproduced) refers to Plaintiff's Exhibit 24C, a connector plug offered into evidence by the Office of the Solicitor. On Exhibit B it is stated that "Transcript index does not indicate whether rec'd in evidence. Solicitor say[s] 24C admitted per his letter of 1/21/86." Page 245 of the transcript shows that this connector plug (Pl. Ex. 24C) was admitted into evidence along with a connector plug offered into evidence by the respondent (Def. Ex. 37).

5. Exhibit B to the ALJ's February 4, 1986 Order contains references to a large number of unused exhibit numbers which the ALJ describes in the following manner "marked for identification Tr. p. 52 but not received; exhibit not described." None of these exhibits were ever referenced or referred to by any party or counsel during the hearing. These are simply documents which were premarked and exchanged between counsel prior to the hearing in accordance with the ALJ's pretrial order, but which were not utilized at trial.

6. On the last page of Exhibit B (to the ALJ's February 4, 1986 Order) the following notation appears by Def. Ex. 55: "Attachment to Titus deposition (Titus Exh. 8) not reconstructed - rec'd Tr. 1036. All other documents in Defendant's Exh. 55 have been reconstructed." Titus Exhibit No. 8 is a handwritten report signed by Michael Titus which relates to events of 11/22/83 (consisting of two pages). The exhibit was received into evidence (Tr. 1036) and a copy of the exhibit was submitted to the ALJ by Roadway pursuant to the ALJ's Order Requiring Reconstruction. An additional copy of Titus Ex. 8 is being submitted to the Secretary with this letter. Titus Exhibit No. 10 is missing, but it is not a "document." Titus Ex. 10 is a videotape used as demonstrative evidence during the testimony of two key witnesses for Roadway. As noted above, this exhibit cannot be reproduced.

7. On January 28, 1986, Roadway mailed to the ALJ copies of all documents which at that time it had been able to reproduce in accordance with the ALJ's Order Requiring Reconstruction. Enclosed with the January 28, 1986 package was a letter of explanation concerning the contents of the package, and an attached list of all of the respondent's exhibits with a description of the exhibits and respondent's understanding of the current status of such exhibits with regard to the ALJ's rulings on admissibility. On January 29, 1986 Roadway's counsel wrote a follow-up letter to Ms. Jeanine Eckholdt, law clerk to Judge Kerr, explaining certain discrepancies and corrections to its previous submission. For the convenience of the Secretary, and in order to ensure that the proper corrections to the record have been made, we are enclosing copies of this correspondence and its enclosures and attachments.

8. On January 31, 1986 counsel for the Solicitor wrote to Judge Kerr submitting corrected versions of Plaintiff's Exhibits 10 and 20 (the corrections were the deletion of handwritten notes which were inadvertently included on the Solicitor's initial submission of copies of these exhibits). Also enclosed with this letter is a copy of the Solicitor's January 31, 1986 letter to Judge Kerr (with enclosures) concerning corrections to Pl. Exs. 10 and 20.

Roadway respectfully requests that the objections and comments contained herein be fully considered by the Secretary in evaluating the current state of the record.

Very truly yours,

FISHER & PHILLIPS

By: /s/ John B. Gamble, Jr.

Michael C. Towers

John B. Gamble, Jr.

Attorneys for Respondent

Roadway Express, Inc.

cc: M. Elizabeth Culbreth, Esq.
James W. Kerr, Jr., Esq.
David E. Jones, Esq.
Eugene A. Lopez, Esq.
Jerry W. Hufstetler

Enclosures